Supreme Court, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1991

STATE OF DELAWARE,
Plaintiff,

STATE OF TEXAS,
Plaintiff-Intervenor,

v.

STATE OF NEW YORK,
Defendant.

MOTION FOR LEAVE TO FILE BRIEF AS AMICI CURIAE AND BRIEF AMICI CURIAE OF MIDWEST SECURITIES TRUST COMPANY AND PHILADELPHIA DEPOSITORY TRUST COMPANY IN SUPPORT OF NEITHER PARTY

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MOTION OF MIDWEST SECURITIES TRUST COMPANY AND PHILADELPHIA DEPOSITORY TRUST COMPANY FOR LEAVE TO FILE BRIEF AS AMICI CURIAE

Midwest Securities Trust Company ("MSTC") and Philadelphia Depository Trust Company ("PDTC"), through their counsel, Foley & Lardner, request leave of this Court to file a brief as *amici curiae*. MSTC and PDTC are specifically mentioned in that section of the Report of the Special Master which deals with securities depositories. Report at B-7. They wish to take exception to certain facts reported by the Special Master insofar as they may be viewed as applying to them.

Counsel has obtained the consent of counsel for the principal parties in this case—the States of Delaware and New York—as well as the consent of Bernard Nash,

counsel for approximately 30 of the intervening states. Given the number of other actual and potential parties, counsel has not obtained additional consents. Accordingly, MSTC and PDTC respectfully request that this Court grant their motion for leave to file this brief as *amici curiae*.

Respectfully submitted,

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Dated this 26th day of May, 1992.

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BRIEF OF MIDWEST SECURITIES TRUST COMPANY AND PHILADELPHIA DEPOSITORY TRUST COMPANY AS AMICI CURIAE

MSTC and PDTC are two of three securities depositories in the United States. The other is Depository Trust Company ("DTC"). DTC, based in New York City, is by far the largest of the three.

In his Report, the Special Master explains that the parties have engaged in substantial discovery concerning the operations of DTC. This discovery apparently included the production of documents, a narrative statement, and one or more depositions. See Report at 6. There was no discovery relating to the operations of MSTC or PDTC.

The Report of Special Master sets forth an extensive recitation of facts relating to "securities depositories,"

apparently derived from the information obtained from DTC. See Appendix B, Section C. These facts, which the Special Master claims are not reasonably subject to dispute, relate only to the operations of DTC. Although the operations of MSTC and PDTC are similar to those of DTC in many respects, there are also important differences. One of these differences relates to the manner in which they treat securities, interest, dividends, and other distributions which cannot be accounted for.

In his report, Special Master Jackson sets forth a series of "metafacts", which he describes as general propositions that are generally beyond dispute. According to the Special Master, it is a "metafact" that depository institutions such as MSTC do not claim any entitlement to funds which, in his words, become "stuck" in the chain of securities distribution. *Report of the Special Master* at B-22. This "metafact", at least as it relates to securities depositories such as MSTC and PDTC, is apparently based on the Special Master's examination of DTC operations. DTC has apparently disclaimed any ownership interest in the funds involved in this case. Report of the Special Master at 10 n.8. In contrast to DTC, MSTC and PDTC do claim entitlement to certain securities, interest payments, dividends and distributions that cannot be accounted for. Under their S.E.C. approved rules, they are entitled to retain these items in appropriate circumstances, placing them in a contingency reserve.

With respect to securities, for example, the MSTC rules provide that:

> In the event the Corporation should determine that the amount of any Security which it holds in its inventory exceeds the amount of such Security which, according to its accounting records, it is obligated to deliver (such determination being herein called "overage determination"), the Corporation shall do the following:

> (i) The Corporation shall use its best efforts to determine which Participant is entitled to the receipt of such Security.
>
> (ii) After three months from the date of the overage determination, the Corporation may make such use of the Security as the officers of the Corporation may deem desirable and in the best interests of the Corporation.
>
> (iii) After two years from the date of the overage determination, the Corporation shall have the right to sell such Security and to deposit the proceeds from such sale in the Contingency Reserve of the Corporation.

Art. VI, Rule 1, *Midwest Stock Exchange Guide*, (CCH) ¶ 3251. The only securities held by MSTC are those which have been deposited by MSTC Participants, or which constitute distribution on such securities. Each MSTC Participant has agreed that any excess securities held by MSTC shall become its property after two years. A similar MSTC rule relates to excess dividends, interest payments, or other distributions. See Art. IV, Rule 1, *Midwest Stock Exchange Guide*, (CCH) ¶ 3231. PDTC operates under rules which are similar to the MSTC rules in these respects.

MSTC and PDTC would thus take exception to the Report of the Special Master to the extent that it may be viewed as relating to their operations. Of course, the Report of the Special Master is technically correct in that he refers to the "excess, unclaimed distributions at issue in this action." (*Id.*) With respect to securities depositories, the actual funds which are the subject of this action include only excess cash and securities held by DTC.

Obviously, the question of MSTC's and PDTC's entitlement to the excess funds under their rules is not before this Court. They wish merely to advise the Court that the Special Master's Report does not accurately reflect

the situation of two of the three securities depositories to which he specifically refers.

Respectfully submitted,

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